PETER JAMES BINSTED

v.

JEVENCIA AUTOR PARTOSA

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[MAINTENANCE APPEAL NO: R1-11-47-98]
21 MARCH 2000

FAMILY LAW: *Children - Paternity - DNA test - Whether court has power to order - Whether power to order DNA test or paternity test exists under statute or common law - Whether a person can be ordered to undergo a blood test against his will*

EVIDENCE: *Proof of - Paternity - DNA test - Whether court has power to order - Whether power to order DNA test or paternity test exists under statute or common law - Whether a person can be ordered to undergo a blood test against his will*

The respondent applied to the Magistrate's Court for maintenance for herself against the appellant under s. 3(1) of the Married Woman and Children (Maintenance) Act 1950 ('the Act'). She claimed that the appellant was her husband and that they had a child from their marriage. The appellant disputed her claims and, upon the respondent's oral application, the magistrate ordered the applicant, the respondent and the child to undergo a deoxyribonucleic acid test ('DNA test'). This was the appellant's appeal against the said order.

Held:

[1] Neither the Act nor any other piece of legislation contains any provision that allows the courts to order a DNA test. The courts in Malaysia have no power under statute or common law to order a person to undergo a test to ascertain paternity. A person is perfectly entitled to refuse to submit himself to such a test.

[Appeal allowed; magistrate's order set aside.]

Legislation referred to:
Penal Code, ss. 319, 323
Married Women and Children (Maintenance) Act 1950, s. 3(1)

Family Law Reform Act 1969 [UK], s. 20

For the appellant - Sharifah Sharlene; M/s Raja Darryl & Loh
For the respondent - WH Kan; M/s Azam-Malek & Soh

Reported by Gan Peng Chiang

JUDGMENT

KC Vohrah J:

In the magistrate's court Juvencia Autor Partosa applied for maintenance for herself against Peter James Binsted (the respondent) under s. 3(1) of the Married Women and Children (Maintenance) Act 1950 (the Act). In her supporting affidavit she claimed that the respondent was her husband and that they had a child from the marriage.

The respondent disputed the marriage and that the child was his.

When the parties appeared in the lower court the applicant's lawyer applied orally to the court to order the respondent, the applicant and child to, *inter alia,* undergo a deoxyribonucleic acid (DNA) test. The magistrate allowed the application and the respondent has appealed against that decision.

My concern in this appeal is not with the merits of the maintenance application which is yet to be decided by the magistrate. I shall only deal with the narrow issue whether the order made by the magistrate is good in law.

At the outset it has to be noted that the Act has no provision to allow any court to make such an order. There is no other general provision in any other legislation that allows that too. This is quite unlike the position in England where s. 20 of the Family Law Reform Act 1969 confers the court "with the power upon a formal application to direct the use of blood test to ascertain paternity ... with his consent ..." It will be seen that even then the provision does not empower the court to order a blood test and even less the power to take blood from an unwilling party. All it does is to permit a direction by the court for the use of blood to ascertain paternity.

It is clear that there is no general power provided by legislation or through common law for any court in Malaysia to order a person to undergo a test to ascertain paternity. In the case of a DNA test it is common knowledge that either a blood, tissue or bone specimen will be taken from the person for testing. If a person refuses to submit himself to such a test he is perfectly entitled to do so; a person cannot be subject to hurt (ie, suffer bodily pain, disease or infirmity) within the meaning of s. 319 of the Penal Code against his will by submitting himself to such test. Whoever carries out such testing without the person's consent would violate s. 323 of the Penal Code for voluntarily causing hurt to the person and a court cannot, in the absence of a specific legislative provision, order such person to submit himself to an unlawful act to be committed on his person.

The magistrate's order is wrong in law and has to be set aside. I allow the appeal with costs.

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